UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of October of two thousand and four.

Present: ROSEMARY S. POOLER,
ROBERT D. SACK,
REENA RAGGI,
Circuit Judges,

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT
Filed OCT 26 2004
Roseann B. MacKechnie, CLERK

UNITED STATES OF AMERICA,

Appellee,

-v- (03-1478)

VICTOR CHEHEBAR,

Appellant.

Appearing for Appellants: Alan M. Dershowitz, Cambridge, MA.

Appearing for Appellees: Emily Berger, Assistant United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (Platt, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED** on motion of the government and the orders entered herein on July 13, 2004, and July 23, 2004, are **VACATED**.

Defendant-Appellant Victor Chehebar appeals from the August 7, 2003, judgment of the United States District Court for the Eastern District of New York, which sentenced him principally to eighteen months imprisonment. Specifically, Chehebar appeals from the district court's denial of his motion for a downward departure based on extraordinary family circumstances.

Chehebar entered into a plea agreement with the government in which he waived the right to appeal if he was

sentenced to twenty-seven months or less in prison. The district court thoroughly explored both the voluntariness of the plea and Chehebar's understanding of the waiver before accepting his plea.

Chehebar contends that, at sentencing, the court struck down the appeals waiver provision through remarks indicating that Chehebar retained a right to appeal. We disagree. The court's "remark[s] at sentencing as to the possibility of an appeal to challenge the Guidelines calculation [do not] vitiate" an enforceable appellate waiver in a plea agreement. United States v. Roitman, 245 F.3d 124, 126 (2d Cir. 2001). In addition, Chehebar argues that the court has the power to alter plea agreements using applicable principles of contract law and should do so here. Our authority to set aside a plea agreement's waiver provision is strictly limited. See United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995) (holding that a knowing and voluntary waiver bars defendant from arguing that the district court erred in sentencing him as long as the sentence is within the stipulated range). Here, the district court insured that the waiver was voluntary and the sentence was imposed within the stipulated range. Therefore, we will not set aside the waiver.

We therefore dismiss the appeal. Previously we had issued two orders, one entered on July 13, 2004, directing that the parties brief the applicability of Blakely v. Washington, 124 S. Ct. 2531 (2004), and one entered July 23, 2004, suspending briefing. Shortly thereafter, we held that Blakely has no application to the Guidelines "[u]nless and until the Supreme Court rules otherwise." United States v. Mincey, 380 F.3d 102, 106 (2d Cir. 2004) This holding moots the two prior orders, which we therefore vacate.

The mandate in this case will be held pending the Supreme Court's decision in United States v. Booker, ___ U.S. ___, 2004 WL 1713654 (Aug. 2, 2004) (mem.) (accepting

certiorari), and United States v. Fanfan, ___ U.S. ___, 2004 WL 1713655 (Aug. 2, 2004) (mem.) (accepting certiorari). Should any party believe there is a need for the district court to exercise jurisdiction prior to the Supreme Court's decision, it may file a motion seeking issuance of the mandate in whole or in part. Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not reconsider those portions of its order that address the defendant's sentence until after the Supreme Court's decision in Booker and Fanfan. In that regard, the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing in light of Booker and Fanfan.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:
Lucille Carr /s/

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 7th day of January two thousand five.

UNITED STATES OF AMERICA,

Docket# 03-1478

Appellee,

v.

VICTOR CHEHEBAR,

Defendant-Appellant

UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT
FILED JAN 7 2005
Roseann B. MacKechnie,
CLERK

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Victor Chehebar.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: Tracy W. Young /s/
Motion Staff Attorney

E.D.N.Y.
02-cr-1260
Platt, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May, two thousand and five,

Present:

Hon. Rosemary S. Pooler,
Hon. Robert D. Sack,
Hon. Reena Raggi,
Circuit Judges.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT
FILED MAY 3, 2005
Roseann B. Mackechnie, CLERK

United States of America,
Appellee,

v. 03-1478

Victor Chehebar,
Defendant-Appellant.

In the aftermath of Blakely v. Washington, 124 S. Ct. 2531 (2004), we issued an October 26, 2004, order in this case disposing of all issues presented, but withheld issuance of the mandate in anticipation of the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005. This court has

recently decided that the waiver of the right to appeal a sentence contained in a valid plea agreement is enforceable against appeals premised on Booker. United States v. Morgan, No. 03-1316, 2005 WL 957186 (2d Cir. Apr. 27, 2005). As a result, there is no reason to disturb our previous order by remanding for consideration of whether to resentence in conformity with United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), or for other proceedings. Therefore, our October 26, 2004, order remains fully effective and it is hereby ORDERED that the mandate be issued.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr /s/

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 23, 2004

Ms. Victoria B. Eiger
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001

Re: Victor Chehebar
v. United States
Application No. 04A824

Dear Ms. Eiger:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on March 23, 2004 extended the time to and including June 6, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/

Melissa Blalock
Case Analyst